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Attn: Pete Melnick



March 7, 2003

Honorable Edward Chavez
5150 State Capitol

EXECUTIVE ORDERS: INDIAN GAMING SPECIAL DISTRIBUTION FUND - #7781

Dear Mr. Chavez:

QUESTION

May the Governor, by executive order, override, amend, or otherwise clarify Section 12012.85 of the Government Code, to designate the California Gambling Control Commission as the entity responsible for the receipt and deposit of contributions in the Indian Gaming Special Distribution Fund?

OPINION

The Governor may not, by executive order, override, amend, or otherwise clarify Section 12012.85 of the Government Code, to designate the California Gambling Control Commission as the entity responsible for the receipt and deposit of contributions in the Indian Gaming Special Distribution Fund.

ANALYSIS

By way of background, on January 28, 2003, the Governor issued Executive Order D-66-03, which states, in pertinent part, as follows:

"NOW, THEREFORE, I GRAY DAVIS, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effect immediately:

"IT IS ORDERED that the California Gambling Control Commission is authorized to and shall collect and account for all contributions under Section 5.1 of the Tribal-State Gaming Compacts for deposit in the Indian Gaming Special Distribution Fund.

"IT IS FURTHER ORDERED that the California Gambling Control Commission is authorized to and shall collect and analyze the certified quarterly reports submitted by the Tribes;

"IT IS FURTHER ORDERED that the State of California's rights to enforce the provisions of Section 5.1 (a) and (b) and 5.3 (b), (c), (d), and (e) of the Tribal-State Gaming Compacts are hereby delegated to the California Gambling Control Commission." (Emphasis added.)

There is no constitutional or statutory provision expressly authorizing the Governor to issue an "executive order." The Governor's chief authority to issue an executive order derives from the constitutional provisions conferring the supreme executive power on the Governor and providing that the Governor shall see that the laws are faithfully executed (Sec. 1, Art. V, Cal. Const.).

As chief executive, the civil administration of the laws of the state is vested in the Governor (Sec. 11150, Gov. C.), and it is the duty of the Governor to supervise the official conduct of all executive and ministerial officers and to see that all offices are filled and their duties performed (Secs. 12010 and 12011). If a default occurs, the Governor is empowered to apply any remedy as the law allows and, if the remedy is imperfect, the Governor is required to so advise the Legislature at its next session (Sec. 12011). It is under this authority that the Governor may issue an "executive order."

Thus, the Governor may issue executive orders to implement and execute the duties and powers vested in the office of the Governor pursuant to constitutional and statutory provisions.

Regardless of the Governor's power to issue executive orders, there is no statutory authority for the Governor to contravene a statute. In addition, because a regulation promulgated by an administrative agency pursuant to its rulemaking powers and "reasonably adapted to the administration of a legislative act has the force and effect of law" (*Dabis v. San Francisco Redevelopment Agency* (1975) 50 Cal.App.3d 704, 706), an executive order also may not contravene a regulation. Thus, generally speaking, the Governor lacks the authority to contravene either a statute or a regulation by executive order.

Thus, we must determine whether Executive Order D-66-03 would contravene any statute or regulation. In that regard, background information on the creation of the tribal-state gaming compacts is relevant to this analysis.

³ All further section references are to the Government Code, unless otherwise specified.

The Indian Gaming Regulatory Act (25 U.S.C. Sec. 2701 and following; hereafter IGRA) creates a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands (*Sycuan Band of Mission Indians v. Roache* (S.D. Cal. 1992) 788 F.Supp. 1498, 1504, *affd.* (1994) 38 F.3d 402, *cert. den. sub nom.*). IGRA requires tribes seeking to conduct Class III gaming activities on their lands within a state to enter into negotiations with that state for the purpose of coming to an agreement, in the form of a tribal-state compact, concerning the conduct and regulation of those activities (25 U.S.C. Sec. 2710). Subdivision (f) of Section 19 of Article IV of the California Constitution provides the Governor with the authority to negotiate and enter into compacts, subject to ratification by the Legislature, for the operation of slot machines, lottery games, and banking and percentage card games (see also Section 12012.25). Fifty-seven identical tribal-state gaming compacts were executed by Governor Davis in September 1999 (hereafter the compacts) and were ratified by Assembly Bill No. 1385 of the 1999-2000 Regular Session (Ch. 874, Stats. 1999) effective January 1, 2000 (subd. (c), Sec. 8, Art. IV, Cal. Const.).

The compacts and the related statutory provisions set forth in the Government Code establish two separate funds, the Indian Gaming Revenue Sharing Trust Fund (hereafter Trust Fund; Sec. 12012.75; Sec. 4.3.2(a)(ii), the compacts) and the Indian Gaming Special Distribution Fund (hereafter Distribution Fund; Sec. 12012.85; Secs. 4.3.2(a)(iii), 5.1, and 5.2, the compacts). To answer the question presented, it is necessary to compare these funds.

Both of these funds were established by the same legislation, Chapter 874 of the Statutes of 1999. That legislation became effective on January 1, 2000, several months after the Governor signed the compacts.²

The statutory language establishing the Trust Fund is set forth in Section 12012.75, which provides as follows:

"12012.75. There is hereby created in the State Treasury a special fund called the Indian Gaming Revenue Sharing Trust Fund' for the receipt and deposit of moneys derived from gaming device license fees that are paid into the fund pursuant to the terms of tribal-state gaming compacts for the purpose of making distributions to noncompact tribes. Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to noncompact tribes, in accordance with distribution plans specified in tribal-state gaming compacts." (Emphasis added.)

Thus, the Trust Fund is a special fund created in the State Treasury for the receipt of specified moneys derived from gaming device license fees. The language of Section 12012.75

² The provisions relating to the Distribution Fund, Section 12012.85, were subsequently amended by Chapter 127 of the Statutes of 2000.

clearly provides that moneys in the Trust Fund shall "be available to the California Gambling Control Commission, upon appropriation by the Legislature" to distribute to noncompact tribes. Therefore, the Gambling Control Commission is statutorily responsible for distributing moneys in the Trust fund, subject to appropriation by the Legislature.

In contrast, the statutory language establishing the Distribution Fund does not specify that the Gambling Control Commission is responsible for administering the moneys in the Distribution Fund. Section 12012.85 provides as follows:

"12012.85. There is hereby created in the State Treasury a fund called the "Indian Gaming Special Distribution Fund" for the receipt and deposit of moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts. These moneys shall be available for appropriation by the Legislature for the following purposes:

"(a) Grants, including any administrative costs, for programs designed to address gambling addiction.

"(b) Grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming.

"(c) Compensation for regulatory costs incurred by the State Gaming Agency and the Department of Justice in connection with the implementation and administration of tribal-state gaming compacts.

"(d) Disbursements for the purpose of implementing the terms of tribal labor relations ordinances promulgated in accordance with the terms of tribal-state gaming compacts ratified pursuant to Chapter 874 of the Statutes of 1999. No more than 10 percent of the funds appropriated in the Budget Act of 2000 for implementation of tribal labor relations ordinances promulgated in accordance with those compacts shall be expended in the selection of the Tribal Labor Panel. The Department of Personnel Administration shall consult with and seek input from the parties prior to any expenditure for purposes of selecting the Tribal Labor Panel. Other than the cost of selecting the Tribal Labor Panel, there shall be no further disbursements until the Tribal Labor Panel, which is selected by mutual agreement of the parties, is in place.

"(e) Any other purpose specified by law." (Emphasis added.)

As can be seen, no particular entity is specifically designated in Section 12012.85 as being responsible for receiving payments to be deposited into the Distribution Fund. The statutory language provides that there is a fund in the State Treasury "called the 'Indian Gaming Special Distribution Fund'" for the receipt and deposit of money received from Indian tribes pursuant to the compacts, and that "these moneys shall be available for appropriation by the Legislature."

In interpreting these provisions, we are guided by the rules of statutory construction. Where a statute, with reference to one subject, contains a given provision, the omission of such a provision from a similar statute concerning a related subject is significant to show that a

different legislative intention existed (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596).

Applying this principle to the statutes set forth above regarding the creation of the Trust Fund and Distribution Fund, it is clear that a different legislative intent existed for the two funds. Both sections were enacted at the same time, and only the Trust Fund provisions designate the Gambling Control Commission as the entity responsible for making the distributions of that fund's money to noncompact tribes. In contrast, the statutory provisions creating the Distribution Fund do not designate the Gambling Control Commission, or any other entity, as responsible for receiving, controlling, or disbursing moneys in that fund. Thus, we conclude that the Legislature did not intend the Gambling Control Commission to be statutorily responsible for receipt or disbursement of moneys deposited into the Distribution Fund.

With respect to its treatment of the Trust Fund and Distribution Fund, the language of the compacts is similar to the statutory provisions governing these funds contained in Sections 12012.75 and 12012.85. In this regard, the compacts provide as follows:

"Sec. 4.3.2. Revenue Sharing with Non-Gaming Tribes.

"(a)

"(ii) The Revenue Sharing Trust Fund is a fund created by the Legislature and administered by the California Gambling Control Commission, as Trustee, for the receipt, deposit, and distribution of monies paid pursuant to this Section 4.3.2.

"(iii) The Special Distribution Fund is a fund created by the Legislature for the receipt, deposit, and distribution of monies paid pursuant to Section 5.0."

"Sec. 4.3.2.1. Revenue Sharing Trust Fund.

"(b)

"The Commission shall serve as the trustee of the fund. The Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes. ..."

Thus, the compacts specifically provide that the Gambling Control Commission is the entity responsible for receiving and depositing payments under the Trust Fund, but do not specify an entity responsible for the receipt or deposit of payments into the Distribution Fund.

In addition, Section 5.1 of the compacts, which describes the process by which revenue is contributed to the Distribution Fund, also does not designate either the Gambling Control Commission or any other state entity as responsible for receiving payments into the Distribution Fund. Moreover, no other statutory provisions provide the authority to designate the Gambling Control Commission as the recipient of those funds.

Generally, all state money not required to be received and kept by someone else is required to be received and kept by the Treasurer (see Secs. 12320 and 12321). That

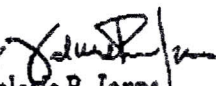
requirement includes bonds and other securities or investments belonging to the state, except those of the Public Employees' Retirement System and the State Teachers' Retirement System (Sec. 12320).

Turning to Executive Order D-66-03, the language provides that "the California Gambling Control Commission is authorized to and shall collect and account for all contributions under Section 5.1 of the Tribal-State Gaming Compacts for deposit in the Indian Gaming Special Distribution Fund." However, as discussed, neither Section 12012.85 nor any other statutory provision, or any provision of the compacts, gives the Gambling Control Commission the authority to receive contributions to the Distribution Fund. Moreover, Sections 12320 and 12321 require all state money not required to be received and kept by another to be received and kept by the Treasurer, and the Governor has no statutory authority to contravene that statutory authority by executive order.

Accordingly, in our opinion, the Governor may not, by executive order, override, amend, or otherwise clarify Section 12012.85 of the Government Code, to designate the California Gambling Control Commission as the entity responsible for the receipt and deposit of contributions in the Indian Gaming Special Distribution Fund.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By 
Valerie R. Jones
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VRJ:jl